Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Promotion of Competitive Networks | ) | WT Docket No. 99-217 |
| in Local Telecommunications Markets | ) | |
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| Wireless Communications Association | ) | |
| International, Inc. Petition for Rulemaking | ) | |
| to Amend Section 1.4000 of the Commission's | ) | |
| Rules to Preempt Restrictions on Subscriber | ) | |
| Premises Reception or Transmission Antennas | ) | |
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| Cellular Telecommunications Industry | ) | |
| Association Petition for Rule Making and | ) | |
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| Discriminatory And/Or Excessive Taxes | ) | |
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| Implementation of the Local Competition | ) | CC Docket No. 96-98 |
| Provisions in the Telecommunications Act of 1996 | ) | |



# COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

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## EXECUTIVE SUMMARY

WCA applauds the Commission's commitment to eliminating longstanding obstacles to full and fair competition among telecommunications providers in multi-tenant environment's ("MTEs"). As the Commission is aware, WCA has participated extensively in prior Commission proceedings designed to assure that video service providers have full and fair access to subscribers in MTEs, and submitted the petition for rulemaking that has led the Commission in this proceeding to propose extending the Commission's antenna preemption rule (47 C.F.R. § 1.4000) so that it protects the right of consumers to install without unreasonable restriction any fixed wireless antenna one meter or less in diameter or diagonal measurement, without regard to whether the antenna is used to receive video programming transmitted via MDS, ITFS, LMDS or DBS. The Commission's expedited treatment of WCA's petition, and its willingness to give similar attention to the myriad of additional legal issues that are delaying aggressive deployment of fixed wireless broadband services in the MTE environment, is precisely what Congress had in mind when in the Telecommunications Act of 1996 (the "1996 Act") it directed the agency to accelerate deployment of broadband services.

It is now beyond debate that the full potential of competitive telecommunications service cannot be realized unless competing providers are accorded nondiscriminatory access to subscribers who reside in MTEs. As has been demonstrated in a variety of filings by fixed wireless operators, that access has proven to be elusive, largely due to anticompetitive behavior by incumbents and/or unreasonable demands by property owners. The result is that more than three years after passage of the 1996 Act, many consumers in MTEs still do not have a *bona fide* choice of telecommunications service providers, and will not have that choice for the foreseeable future unless the Commission acts swiftly and decisively to eliminate third party barriers to entry in the MTE environment. With its initiatives to promote the use of MDS/ITFS, DEMS, LMDS, 38 GHz and other wireless spectrum for telecommunications services, the Commission has moved aggressively to introduce competition over the "last mile." That competition will be stymied, however, unless the Commission moves equally aggressively to provide all competitors full and fair access to the "last hundred feet" in MTE settings.

To begin with, WCA believes that the public interest will be advanced by extending the antenna preemption rule set forth in Section 1.4000 to encompass not only antennas used to receive video programming delivered over MDS, ITFS, LMDS and DBS, but all wireless antennas no more than one meter in diameter or diagonal measurement. The objectives of Section 1.4000 -- to promote the widest possible deployment of antennas while still preserving local authority over legitimate safety and historic preservation issues -- are as applicable to antennas used to receive non-video material as those used to receive video material. Moreover, the Commission has sufficient authority to amend its antenna preemption rule as proposed in WCA's petition and the *NPRM* here. The statute that led to the adoption of Section 1.4000, Section 207 of the 1996 Act, was not itself a separate and independent grant of preemption authority to the Commission; rather, Section 207 merely directed the Commission to exercise the preemptive authority it already had under Section 303 of the 1934 Act to prohibit nonfederal restrictions on fixed wireless antennas used to receive video programming services in certain frequency bands. Indeed, the Commission has previously

determined that the antennas identified in Section 207 represent the *minimum* entitled to preemption protection, and has preempted local restrictions on antennas not covered by Section 207. There otherwise is nothing that constrains the Commission from extending its preemption to all fixed wireless antennas, subject to the safety, historic preservation and other regulatory restrictions already in the antenna preemption rule.

While grant of the relief sought by WCA's petition will be of substantial value to fixed wireless providers, it alone cannot assure that subscribers within MTEs will have unfettered access to the wireless service provider of their choice. The primary effect of Section 1.4000 is to eliminate local governments and homeowner associations as impediments to the deployment of fixed wireless services. However, in all but those rare cases where the wireless service can be provided through an antenna mounted at a location within the exclusive domain of the tenant, Section 1.4000 does nothing to prevent MTE building owners and incumbents from restricting a wireless provider from installing a rooftop antenna and other associated equipment, and running the wiring through common areas of the building to individual units or using existing wiring.

Thus, the Commission must take further action to provide relief to consumers who desire to be served by competitive fixed wireless providers, but cannot be served because the competitive provider of choice lacks nondiscriminatory access to intrabuilding wiring, rooftop areas, conduit and/or other space or facilities needed to deliver service. To address this problem, WCA proposes that the Commission adopt a package of regulatory reforms that will provide competing wireless telecommunications providers with full and fair access to MTE residents.

First, the Commission can and should declare that where a utility owns or controls a right-of-way to use rooftop areas, conduit and/or other space in an MTE, the utility must provide competitors with nondiscriminatory access to those areas under Section 224(f)(1) of the 1934 Act. The language and structure of the 1934 Act as a whole, viewed in the context of relevant Supreme Court and other judicial precedent, confirms that the term "right-of-way" as used in Section 224(f)(1) encompasses private property and thus would include rooftops, conduit and/or other space where a property owner has already given a utility the right to use those areas.

Second, the Commission can and should declare that an incumbent LEC's network interface devices ("NIDs") and intrabuilding wiring (*e.g.*, that which runs from the NID to the customer's unit) are unbundled network elements or "UNEs" under Section 251(c)(3) of the 1996 Act, and that an incumbent LEC must unbundle and provide competitors with nondiscriminatory access to those items in accordance with the statute. In situations where the property owner will not permit a "postwiring" of his or her premises or where the cost of such postwiring would be prohibitive, this is necessary to prevent an incumbent LEC from forestalling competitive entry by denying a fixed wireless provider any access to existing wiring already in the building.

Finally, WCA believes that the Commission can and should adopt a rule mandating that property owners provide competing telecommunications providers with nondiscriminatory access to MTE property. Various provisions of the Communications Act give the Commission broad

authority to regulate marketplace behavior that eliminates consumer choice. Clearly, that is the issue here: in situations where a property owner gives incumbent providers but not their competitors a right to enter MTE property, consumers are denied a full and fair opportunity to select between competing providers and purchase service from the one that best suits their needs and preferences. Both the statute and Commission precedent establish that the Commission may alleviate this problem directly through the adoption of a federal nondiscriminatory access rule, without effecting an unauthorized taking under the Fifth Amendment. If, however, the Commission believes that resolution of that issue will require further proceedings or legislative reform, WCA urges the agency to facilitate nondiscriminatory access by (1) banning those clearly under the Commission's jurisdiction (LECs, cable system operators, radio licensees) from entering into any future exclusive contracts with property owners; (2) adopting a "fresh look" policy with respect to existing MTE contracts for telecommunications and cable services; and (3) preempting discriminatory state mandatory access statutes which give certain incumbent broadband providers but not their competitors a right to enter MTE property without the property owner's consent.

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**COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.**

The Wireless Communications Association International, Inc. ("WCA") hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking and Notice of Inquiry* in WT Docket No. 99-217 (the "*NPRM*") and *Third Further Notice of Proposed Rulemaking* in CC Docket No. 96-98 (the "*Third Further Notice*").[1/]

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[1/] FCC 99-141 (rel. July 7, 1999). The Commission has extended the comment and reply comment deadlines for its *Notice of Inquiry* with respect to local franchising practices and the Cellular Telecommunications Industry Association's Petition for Rule Making on preemption of discriminatory and/or excessive nonfederal taxation of telecommunications service providers. *See Promotion of Competitive Networks in Local Telecommunications Networks, et al.*, WT Docket No. 99-217 and CC Docket No. 96-98, DA 99-1563 (rel. Aug. 6, 1999) (extending comment and reply comment deadlines to October 12 and December 13, 1999, respectively). WCA will be submitting its comments on the issues raised in the *Notice of Inquiry* in accordance with the revised schedule

## I. INTRODUCTION

WCA is the principal trade association of the fixed wireless broadband communications industry. Its membership includes a wide variety of Commission licensees, wireless broadband telecommunications system operators, equipment manufacturers and consultants interested in the domestic deployment of spectrum at 2.1 GHz, 2.3 GHz, 2.5 GHz, 18 GHz, 24 GHz, 31 GHz and 38 GHz allocated generally to the Multipoint Distribution Service ("MDS"), Wireless Communications Service ("WCS"), Instructional Television Fixed Service ("ITFS"), Digital Electronic Message Service ("DEMS"), Local Multipoint Distribution Service ("LMDS") and Private Operational Fixed Service ("OFS") for the provision of fixed wireless broadband telecommunications services. WCA's members are at the forefront of "the arrival of broadband communications services of the twenty-first century,"[2/] and thus have a direct and substantial interest in this proceeding.

As the Commission is aware, WCA has participated extensively in prior Commission proceedings designed to assure that video service providers have full and fair access to subscribers in MTEs, and submitted the petition for rulemaking that has led the Commission in this proceeding to propose extending the Commission's antenna preemption rule (47 C.F.R. § 1.4000) so that it protects the ability of consumers to install without undue restriction any fixed wireless antenna one meter or less in diameter or diagonal measurement, regardless of whether it is used to receive video

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for that portion of this proceeding.

[2/] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398 (1999).

programming transmitted via MDS, ITFS, LMDS or DBS.[3/] The Commission's expedited treatment of WCA's petition, and its willingness to give similar attention to the myriad of additional legal issues that are delaying aggressive deployment of fixed wireless broadband services in the MTE environment, is precisely what Congress had in mind when in the Telecommunications Act of 1996 (the "1996 Act") it directed the agency to accelerate deployment of broadband services.[4/]

The Commission has recognized that fixed wireless services represent a cost-efficient, near-term solution to the "last mile" problem that has frustrated the emergence of competition in local markets for telecommunications and multichannel video services.[5/] The fact remains, however, that fixed wireless providers cannot meet the accelerating demand in the marketplace for high-capacity transmission links if property owners and/or incumbent telecommunications providers can effectively prevent service to end users located in MTEs.[6/] By now the Commission is well aware

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[3/] Petition for Rulemaking of The Wireless Communications Association International, Inc. re: Amendment of Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services (filed May 26, 1999) (the "WCA Petition").

[4/] 1996 Act § 706(a), Pub. L. 104-104, 110 Stat. 153 (1996).

[5/] *See, e.g., NPRM* at ¶ 5 ("[T]he prospects for facilities-based competition in the near term are especially great from providers that can avoid the need to duplicate the incumbent LECs' costly wireline networks, either by using wireless technology or by using existing facilities to customer locations.").

[6/] *See* Werbach, "Digital Tornado: The Internet and Telecommunications Policy," *OPP Working Paper No. 29*, at 24 (March 1997) ("There is a tremendous level of pent-up demand for bandwidth in the user community today. Most users today are limited to the maximum speed of analog phone lines, which appears to be close to the 28.8 or 33.6 kbps supported by current analog modems, but new technologies promise tremendous gains in the bandwidth available to the home."); Statement of William J. Rouhana, Jr., Chairman and Chief Executive Officer, WinStar Communications, Inc., Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection (May 13, 1999) ("Securing building access rights to install our antennas on the roof, plus access to risers and conduits, telephone closets, and pre-existing inside wire, are crucial steps in the construction and

of the various obstacles which property owners place between competing providers and MTE residents:

> [M]any building owners do not view access by competitive carriers as a priority for their tenants; some completely prohibit access to their tenants; many others impose unreasonable conditions or rates that effectively preclude entry by competitive carriers. As an example, one building owner on the East Coast requested $50,000 upon signing of an access contract with WinStar in addition to $1,200 per month. By contrast the incumbent provider rarely pays anything to the building owner for access to customers in the building. For tenants, the 1996 Act thus far has failed to provide the choices envisioned by Congress.[7/]

Simply stated, access to rooftop areas, conduit and internal wiring *is* access to the subscriber in the MTE environment.[8/] Congress and the Commission have recognized as much, and in the multichannel video context have made incremental (but ultimately insufficient progress) toward affording fixed wireless competitors access to areas within or adjacent to a tenant's individual unit.[9/]

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expansion of our local broadband network.") (the "Rouhana Statement").

[7/] *See* Rouhana Statement, *supra* note 6.

[8/] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 - Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 99-136, Appendix F at 15 (rel. June 24, 1999) ("Fixed wireless providers have noted a number of barriers to access to customers' premises. Such barriers include roof rights as well as related inside building facilities and inside wiring. Fixed wireless providers need rooftop access on apartment and office buildings to place their transmitting and receiving antennas. Providers also need access to the building's inside wiring and riser cables to connect to the customer's telephone system.").

[9/] *See, e.g., Implementation of Section 207 of the Telecommunications Act of 1996 - Restrictions on Over-the-Air Reception Devices, Television Broadcast and Multichannel Multipoint Distribution Service*, 13 FCC Rcd 23874 (1996) (extension of antenna preemption rule to antennas used to receive video programming services on rental property) (the "*Section 207 Second Report and Order*"); *Telecommunications Services - Inside Wiring*, 13 FCC Rcd 3659 (1997) (adoption of cable home wiring and cable home run wiring rules for multichannel video providers in multiple dwelling units). As noted in WCA's pending Petition for Reconsideration in CS Docket No. 95-184 and MM Docket No. 92-260, the Commission's inside wiring rules for MVPDs do not go far enough towards eliminating an incumbent's arsenal of tactics for remaining, in an MTE against the property owner's

However, fixed wireless providers offering voice, data (including high-speed Internet access) and other non-video services find themselves competing head-to-head with incumbent broadband providers (*e.g.*, RBOCs, cable MSOs) who, by virtue of regulatory loopholes and their own discriminatory conduct, have both the incentive and the ability to deny competitors full and fair access to MTE property when they provide telecommunications services.[10/] It is for this reason that

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wishes or otherwise delaying competitive entry into the MTE environment. Petition for Reconsideration of The Wireless Communications Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260 (filed Dec. 15, 1997) (requesting further amendment of Commission's MVPD inside wiring rules to (1) eliminate the incumbent's option to remove its wiring and thereby force a competitor to "postwire" the premises; (2) preempt discriminatory state mandatory access statutes; and (3) require that where an incumbent elects to sell its wiring to a competing provider, the MDU owner or the competitor must purchase the wiring within 30 days of the incumbent's election, at a price which reflects depreciated value).

[10/] *See, e.g.*, Sen. R. Michael DeWine and Sen. Herbert Kohl, "The Changing Status of Competition to Cable Television," Report to Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate, at 27 (July 8, 1999) ("Markets for video, voice, and data services are rapidly converging, as firms in previously distinct industry segments are merging, deploying new technologies and infrastructures, and introducing new communications applications and services. . . The primary goal . . . is to combine voice, television and data services."); Statement of C. Michael Armstrong, Chairman and CEO, AT&T Corp., before the Senate Judiciary Committee (July 14, 1999) ("[M]icrosoft has also made a $5 billion investment in AT&T, amounting to approximately a 3% equity stake in the company. . . the investment in AT&T by Microsoft will be used to accelerate the upgrade of AT&T's cable networks. That means quicker delivery of the competitive local telephone service, digital television, and high-speed Internet access we've promised to customers."); Statement of Anna-Maria Kovacs, First Vice President, Janney Montgomery Scott, before the Senate Judiciary Committee (July 14, 1999) (available at <http:/www.senate.gov/~judiciary/71499amk.htm>) ("The major players in each of these segments [video, voice, etc.] are trying to play in all segments, as they prepare for a world in which they expect a large part of the market to require bundled services. Thus, they are moving from their traditional areas of strength into new areas, concerned that they will not be able to defend their original position unless they are equally competitive in the other segments.").

this proceeding represents the most critical phase of the Commission's continuing effort to promote widespread deployment of broadband services as mandated by Section 706 of the 1996 Act .[11/]

As demonstrated in WCA's Petition and in various *ex parte* filings by fixed wireless providers over the past several months, the Commission can and should take certain carefully targeted actions which will lower third-party barriers to competition in the MTE environment without running afoul of legitimate rights of property owners. Specifically, WCA believes that the Commission can and should do the following:

- amend Section 1.4000 of its rules as requested in WCA's Petition, so that the rule protects the right of consumers to reasonably deploy any fixed wireless antenna one meter or less in diameter or diagonal measurement used in the provision of any type of wireless service in any frequency band;

- declare that where a utility owns or controls a right-of-way to use rooftop areas, conduit or other space in an MTE, it must provide competing telecommunications providers nondiscriminatory access to those areas under

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[11/] *See* Statement of Thomas Sugrue, Chief, Wireless Telecommunications Bureau, before the Subcommittee on Telecommunications, Trade and Consumer Protection, United States House of Representatives, re: Access to Buildings and Facilities by Telecommunications Providers (May 13, 1999) ("[T]he benefits of competition cannot be fully realized unless competitive local telecommunications services can be made available to all consumers, including both business and residential customers, regardless of where they live or whether they rent or own their premises. To the extent that certain classes of customers are unnecessarily disabled from choosing among competing telecommunications providers, the Congressional goal of deploying services 'to all Americans' is placed in jeopardy.").

Federal action is necessary because only four States have acted to provide those in MTEs with the ability to be served by the competitive telecommunications provider of their choice. Both Texas and Connecticut have adopted legislation requiring landlords to permit telecommunications carriers to install their facilities to provide service to their tenants. *See* Connecticut General Statutes, Section 16-2471; Texas Public Utility Regulatory Act §§ 54.259 and 54.260, *implemented by* Texas Public Utility Commission Project No. 18000. Similarly, the Ohio Public Utilities Commission has ruled that landlords cannot unreasonably restrict any tenant from receiving telecommunications services from any provider of the tenant's choice. *Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire*, Case No. 86-927-TP-COI, *Supplemental Finding and Order*, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sept. 29, 1994).

Section 224(f)(1) of the Communications Act of 1934, as amended (the "Communications Act");

- require that incumbent local exchange carriers unbundle "intrabuilding" wiring and other MTE facilities in accordance with Section 251(c)(3) of the Communications Act and any associated Commission rules; and

- adopt a federal nondiscriminatory access rule for MTE property, and, in the event that adoption of such a rule requires further proceedings and/or legislative reform, facilitate nondiscriminatory access to MTE property by (1) imposing a ban on all future exclusive contracts between telecommunications service providers and property owners; (2) adopting a "fresh look" policy for existing exclusive contracts; and (3) preempting discriminatory state mandatory access statutes.[12/]

## II. DISCUSSION

### A. THE COMMISSION SHOULD AMEND SECTION 1.4000 OF ITS RULES AS REQUESTED IN WCA'S PETITION.

At the outset, WCA urges the Commission to amend Section 1.4000 to provide antenna preemption protection for all fixed wireless antennas one meter or less in diameter or diagonal measurement, regardless of the services or frequency bands involved. For the reasons set forth below, there should be no question that such an amendment will advance the public interest in

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[12/] The Commission recently submitted to Congress a draft strategic plan which, among other things, asks Congress to "remove entry barriers and expand consumer access to competing providers of multichannel video programming and non-video telecommunications and information services to apartment houses, condominium buildings, and other multiple dwelling units when a resident requests service," and to "authorize the FCC to extend protection over broadband transmit/receive antennas, *i.e.*, small antennas used to receive and to transmit broadband signals, including but not limited to two-way information transmissions and/or transmission of information, using data, video, audio or other digital services." Kennard, "A New FCC for the 21st Century," at 38 (August 1999) (available at <http://www.fcc.gov/21st century>). WCA applauds the Commission's commitment to work jointly with the Congress to eliminate any questions as to the Commission's authority to resolve the MTE access problem. However, for the reasons set forth herein, WCA believes that the Commission already has authority under the Communications Act to adopt the proposals advanced in this Petition.

promoting the rapid deployment of wireless telecommunications services, and that the Commission has authority under the Communications Act to take such action.

There is ample policy justification for a grant of the amendment of Section 1.4000 as sought by WCA's Petition and proposed in the *NPRM*. As previously noted by WCA, the record before the Commission demonstrates that the troublesome non-federal restrictions on installation, use and maintenance of fixed wireless antennas that led to the adoption of Section 1.4000 generally are targeted at all antennas, regardless of whether they are designed to receive video programming and regardless of the frequency band they use.[13/] Thus, those very same antenna restrictions that have been preempted when applied to video antennas continue to unreasonably restrict non-video antennas. Indeed, since the filing of its Petition, WCA has become aware of instances in which property owners and homeowners associations are imposing restrictions on fixed wireless antennas used to receive non-video services, citing the fact that Section 1.4000 only applies where a fixed wireless antenna is used to receive video programming services in the MDS, ITFS, LMDS or DBS frequency bands.

Amendment of Section 1.4000 as requested by WCA would provide relief for fixed wireless providers in three circumstances. First, the amended Section 1.4000 would preempt public (*e.g.*, local zoning ordinances, building codes) and private restrictions (*e.g.*, homeowners association covenants) that unreasonably prevent subscribers from installing, using or maintaining fixed wireless antennas in single family residences, subject to the safety, historic preservation and other exceptions

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[13/] *See* WCA Petition at 13-14, n.27 and the cases cited therein.

already in the rule.[14] Second, the amended Section 1.4000 would preempt public restrictions that unreasonably prevent tenants from installing, using or maintaining fixed wireless antennas within their individual MTE units. Finally, assuming the Commission's application of Section 207 to rental property is upheld by the D.C. Circuit, the amended Section 1.4000 would preempt property owner restrictions that unreasonably prevent tenants from installing, using or maintaining fixed wireless antennas within their individual MTE units.[15] Each type of relief would facilitate accelerated

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[14] The Commission asks whether preemption of State or local restrictions on fixed antennas used to transmit and receive "personal wireless services" would be consistent with Section 332(c)(7) of the Communications Act, which generally provides that nothing in the Act shall limit the authority of a State or local government over decisions regarding the placement, construction or modification of "personal wireless facilities." *NPRM* at ¶ 69. The legislative history of that section reflects that the term "personal wireless facilities" was intended to refer to transmission towers and other infrastructure-related equipment, not customer premises equipment, and thus the rights of States and local authorities under Section 332(c)(7) do not limit the Commission's preemption authority under Section 207. *See* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. at 207 (1996) ("Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee . . . [was] to have attempted to develop a uniform policy to propose to the Commission for the siting of *wireless tower sites.*") (emphasis added); *id.* at 208 ("The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services . . . unreasonably favor one competitor over another. . . For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.").

[15] *See Building Owners and Managers Association International, et al. v. FCC*, Case No. 98-1610 (D.C. Cir., docketed Dec. 23, 1998). If the FCC is successful on appeal, expansion of the Section 1.4000 in this proceeding to cover all fixed wireless antennas installed in individual MTE units would not effect an unauthorized taking under *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). In that case, the D.C. Circuit held that the Commission could not, absent express or implied statutory authority, interpret Section 201(a) of the Communications Act to require an ILEC to permit a competitive access provider to connect its facilities to the ILEC's network via physical collocation. In so doing, however, the Court noted that the requirement of statutory authority applies *only* where the Commission's interpretation of the underlying statute effects a compensable taking in all cases to which the statute is applied, *i.e.*, a *per se* taking. *Bell Atlantic*, 24 F.3d at 1446. The requirement of specific statutory authority does not apply to an agency order alleged to constitute a *regulatory* taking under the standards of *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978), since the statutory interpretation adopted by the agency could not be seen

deployment of fixed wireless service to consumers without running afoul of the legitimate rights of property owners.

That the Commission has authority to grant the requested relief is patent. It is well settled that the Commission may preempt any state or local regulation that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress."[16/] The Commission's authority to so preempt arises first and foremost from Section 1 of the Communications Act, which directs the Commission to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service . . . ."[17/] The United States Supreme Court has confirmed that Congress meant to confer "broad authority" on the Commission, so as "to maintain, through appropriate administrative control, a grip on the dynamic

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to produce a compensable taking in all cases. *Id.* The Commission has already determined that, unlike the case with mandatory physical collocation, the application of Section 1.4000 to rental property merely regulates the use of private property and thus does not effect a *per se* taking under the Fifth Amendment. *Section 207 Second Report and Order*, 13 FCC Rcd at 23885-6. Assuming that the D.C. Circuit agrees in its consideration of the current video-centric version of Section 1.4000, then, *ergo*, extension of Section 1.4000 to cover all fixed wireless antennas on rental property would not be a *per se* taking and thus would not be prohibited for lack of statutory authority under *Bell Atlantic*.

[16/] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) ("*Crisp*"), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services (Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking)*, 12 FCC Rcd 12545, 12769-12700 (1997), *citing Fidelity Fed. S&L Ass'n v. De La Cuesta*, 458 U.S. 141, 156 (1982).

[17/] 47 U.S.C. § 151.

aspects of radio transmission."[18] Thus, Section 4(i) of the Act states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[19] Similarly, Section 303 gives the Commission the power to issue rules and regulations "as public convenience, interest and necessity requires."[20] The need for such comprehensive power stems from "the practical difficulties inhering state-by-state regulation of parts of an organic whole . . . fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications."[21]

Accordingly, the Commission has repeatedly exercised its broad authority to preempt non-federal rules and regulations that directly or indirectly impaired the installation or use of antennas necessary for consumers to access wireless services. For instance, in 1983 the Commission preempted state regulation of satellite master antenna television service. In so doing, the Commission noted that:

> [a]lthough preemption was not specifically discussed in our satellite authorization proceedings or in our deregulation of earth stations, we believe it is clear that local prior approval requirements are inconsistent with national policies in these areas. In

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[18] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (citations omitted); *see also National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (Congress granted the Commission "expansive powers" through the Communications Act).

[19] 47 U.S.C. § 154(i).

[20] *Id.* at § 303.

[21] *General Telephone of California v. FCC*, 413 F.2d 390, 398, 401 (D.C. Cir. 1968).

> more general terms, *"receiving sets" have been held to be "absolutely essential instrumentalities" of radio broadcasting.*[22/]

In 1986, the Commission preempted state and local restrictions on satellite receive antennas that are very similar to the restrictions at issue here.[23/] The Commission took such action to give effect to the Congressional policy favoring development of new technologies and expanded consumer choice, as expressed at that time in Section 705 of the Communications Act (47 U.S.C. § 605).[24/] Specifically, the Commission concluded that:

> [i]f individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by section 705 [of the Communications Act] to interstate communications delivered by satellite will be useless. . . . Such regulations would frustrate our competitive regulatory policies which have been promulgated to provide for a variety of service[s] by consumers. It would be contrary to those policies to permit discriminatory local regulation which reduces the range of choice.[25/]

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[22/] *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223, 1232 (1983) (citation omitted) (emphasis added), *aff'd sub nom. N.Y. State Com'n On Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). Similarly, in affirming the Commission's decision in *Orth-O-Vision, Inc.* to preempt state regulation of MDS service, the United States Court of Appeals for the Second Circuit observed that such regulation "could frustrate the development of an interstate network by increasing the cost for each program per receiver." *N.Y. State Com'n On Cable T.V. v. FCC*, 669 F.2d 58, 65-66 (2nd Cir. 1982) (footnote omitted).

[23/] *Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986) (the "*1986 Satellite Preemption Order*").

[24/] *See Local Zoning Regulations (Notice of Proposed Rulemaking)*, 100 FCC 2d 846, 850 (1985) ("[R]ecent amendments to the Communications Act, 47 U.S.C. § 705, provide that unless the sender has established a marketing system an individual using a satellite antenna at his dwelling may freely receive unscrambled satellite cable programming without incurring any liability for unauthorized interception. . . . In enacting this legislation, Congress wished to ensure that Americans who did not have access to cable programming would be able to obtain such programming.").

[25/] *1986 Satellite Preemption Order* at ¶ 26 (1986). *See also, Preemption of State and Local Laws Concerning Amateur Operator Use of Transceivers Capable of Reception Beyond Amateur Service Frequency Allocations*, 8 FCC Rcd 6413, 6416 (1993) (finding that certain state and local scanner laws "prevent amateur operators from using their mobile stations to the full extent permitted under

Section 207 of the 1996 Act was grounded in the same basic idea, *i.e.*, that Commission preemption of non-federal restrictions on the deployment of antennas on subscriber premises is essential to assure "to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service . . . ."[26/] Section 207 was not itself a separate and independent grant of preemption authority to the Commission; rather, Section 207 merely directed the Commission to exercise the preemptive authority it already had "pursuant to Section 303 of the Communications Act" to prohibit restrictions on over-the-air reception of video programming delivered using certain services.[27/]

Indeed, the Commission confirmed this very point in its 1996 *Report and Order* in IB Docket No. 95-59 modifying certain provisions of its 1986 satellite antenna preemption rules. In discussing its authority to preempt non-federal restrictions on use of satellite antennas other than those encompassed by Section 207, the Commission stated in no uncertain terms that Section 207 merely directs the Commission to exercise its pre-existing preemption authority in a particular area, and does not confine its broad power to preempt restrictions on receive antennas where necessary to achieve the objectives of the Communications Act:

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the Commission's Rules and thus are in clear conflict with federal objectives of facilitating and promoting the Amateur Radio Service.").

[26/] *See Implementation of Section 207 of the Telecommunications Act of 1996 - Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service (Notice of Proposed Rulemaking)*, 11 FCC Rcd 6357 (1996), *quoting* 47 U.S.C. § 151.

[27/] 1996 Act § 207, Pub. L. 104-104, 110 Stat. 114 (1996). *See also AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 142 L. Ed. 2d 834 n.5 (1999) ("[T]he 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence *part of*, an Act which said that 'the Commission may prescribe such rules and regulations as may be necessary to carry out the provisions of this Act.'") (emphasis in original).

> Congress has made clear [in Section 207] that, *at a minimum*, we must preempt restrictions imposed on a subset of all satellite earth station antennas, [*i.e.*,] all DBS antennas . . . .We believe that nothing in the new legislation affects our broad authority to preempt state and local zoning regulations that burden a user's right to receive all satellite-delivered video programming (not just the subset specifically singled out by Congress in Section 207) or that inhibit the use of transmitting antennas.[28/]

Accordingly, WCA submits that the Commission has authority under the Communications Act to expand the scope of Section 1.4000 as requested by WCA, and nothing in Section 207 constrains that authority in any respect.[29/]

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[28/] *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809, 5812 (1996) (footnote omitted) (emphasis added). It should also be noted that in an administrative context courts disfavor the principle of *expressio unius maxim* - - that the expression of one is the exclusion of others. *See Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1995), *quoting Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron v. NRDC*, 467 U.S. 837, 842 (1984)). Given the pro-competitive intent of the 1996 Act and the broad public interest authority Congress has delegated to the Commission, it is more sensible to interpret the video and frequency band restrictions in Section 207 as referring only to those "baseline" categories of antennas that *must* be included in the Commission's antenna preemption rule. *Id.*, *quoting Texas Rural Legal Aid*, 940 F.2d at 694 ("[A] congressional prohibition of particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger.").

[29/] The Commission's authority here is bolstered by Section 253(d) of the Communications Act, which directs the Commission to preempt any State or local law that "may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service." 47 U.S.C. § 253(d). In other words, to the extent that fixed wireless operators will be providing "telecommunications services" (and many will, while others may not), Section 253(d) *mandates* that the Commission preempt non-federal antenna restrictions that prevent them from providing wireless services.

## B. THE COMMISSION SHOULD ADOPT A PACKAGE OF REGULATORY SOLUTIONS TO ENSURE THAT COMPETING PROVIDERS WILL RECEIVE NONDISCRIMINATORY ACCESS TO MULTI-TENANT ENVIRONMENTS.

WCA wishes to emphasize that while many of the Commission's proposals in the *NPRM* and *Third Further Notice* will improve the prospects for full and fair competition between telecommunications providers in the MTE environment, there is no one solution that will provide fixed wireless providers with nondiscriminatory access to MTE residents in all situations. This is because access to an MTE subscriber is impossible without access to the various subparts of the distribution chain between the provider and the customer, including (1) rooftop areas; (2) internal wiring within the building; (3) riser conduit (both horizontal and vertical); (4) other conduit in common areas, such as that which runs through the hallway to the subscriber's unit; (5) network interface devices ("NIDs"); and (6) telephone closets.

The extent to which a competitor needs access to each of these items will vary depending on its own technical requirements and the architecture of each MTE at issue. For example, while access to rooftop areas is critical to fixed wireless providers, it is irrelevant to landline providers who do not use microwave technology to deliver service. Also, for technical reasons many competitors prefer to use their own wiring rather than that which is already in the building, and thus would not seek access to that component of the distribution chain. Others prefer to have access to their own space from the NID to the customer, and thus would prefer not to share riser conduit with the incumbent. In other words, there is no "silver bullet" that will assure competition in all MTEs, and thus it is imperative that the Commission adopt a package of regulatory reforms as described below, so as to give fixed wireless providers the type of relief that is necessary to obtain nondiscriminatory access to any given MTE. This will not only maximize the prospects for competitive entry in all

types of MTEs, but will relieve the Commission of having to revisit this issue again in the near term to address situations not covered by each type of relief standing alone.

*1. The Commission Should Declare That Where a Utility Owns or Controls a Right-Of-Way to Use Rooftop Areas and Conduit in an MTE, It Must Provide Competing Telecommunications Providers Nondiscriminatory Access to Those Areas Under Section 224(f)(1) of the Communications Act.*

Section 224(f)(1) requires utilities, including local exchange carriers ("LECs"), to provide able television systems and telecommunications carriers with nondiscriminatory access to any "pole, duct, conduit, or right-of-way" that they own or control. In the *NPRM*, the Commission tentatively concludes that the term "right-of-way" is broad enough to encompass a right to place an antenna or use conduit on private property.[30/] WCA agrees and, for the reasons set forth below, the Commission should declare that where a utility owns or controls a right of way to use a rooftop and/or conduit in an MTE, the utility must provide competing telecommunications providers with nondiscriminatory access to those areas as required under Section 224(f)(1), subject to payment of just and reasonable compensation as required under the statute.

The term "right-of-way" is not defined in Section 224 or in any other provision of the Communications Act. Congress's silence thus compels the Commission to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."[31/] As noted in the *NPRM*, the term "right-of-way" is commonly understood to mean the right to use or

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[30/] *NPRM* at ¶ ¶ 41-44.

[31/] *Russello v. United States*, 464 U.S. 16, 21 (1983), *quoting Richards v. United States*, 369 U.S. 1, 9 (1962).

pass over the property of another.[32/] Rooftop areas and conduit owned or controlled by a utility in an MTE fall squarely within this definition, and thus should be encompassed by the nondiscriminatory access requirement in Section 224(f)(1).

Moreover, it is well settled that the Commission is accorded substantial deference when interpreting undefined statutory terms, so long as its interpretation is consistent with the "structure and language of the statute as a whole."[33/] As noted by the Commission elsewhere, the purpose of Section 224 is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.[34/] Where wireless

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[32/] *NPRM* at ¶ 42; *see also* Black's Law Dictionary at 1326 (Sixth Ed.) (defining "right of way" as "term used to describe a right belonging to a party to pass over land of another").

[33/] *ASTV v. FCC*, 46 F.3d 1446, 1449 (D.C. Cir. 1994). *See also Serono Laboratories, Inc. v. E. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-3 (1984) ("Under *Chevron*, we first ask 'whether Congress has directly spoken to the precise question at issue,' in which case we 'give effect to the unambiguously expressed intent of Congress.' But if Congress has been silent or ambiguous about the meaning of the specific question at issue, we defer to the agency's interpretation so long as it is 'based on a permissible construction of the statute.'"); *Suramerica de Aleaciones Laminadas, C.A. v. U.S.*, 966 F.2d 660, 667 (Fed. Cir. 1992), *quoting Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("To sustain [an agency's] interpretation of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."); *U.S. West Communications, Inc. v. FCC*, Case No. 98-1468 (D.C. Cir., decided June 8, 1999), *citing Chevron*. 467 U.S. at 845 ("The statutory term 'provide' appears to us somewhat ambiguous in the present context. . . [The] FCC's reading of 'provide' to include the BOC's actions here, . . ., appears clearly reasonable in the specific context of Section 271 [of the Telecommunications Act of 1996].").

[34/] *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments,* 13 FCC Rcd 6777, 6780 (1998) ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.").

operators are concerned, rooftop areas and conduit are indispensable to the deployment of a telecommunications network, since without them a wireless operator has no ability to provide service to customers in the MTE environment.[35] Congress clearly did not intend to give competing telecommunications service providers access to some utility rights-of-way but not others. Indeed, such a holding would vitiate the entire point of the statute.[36]

Furthermore, the fact that Congress did not refer specifically to rooftop areas or conduit in Section 224(f)(1) does not limit the Commission's authority to interpret the statute as suggested above. The United States Supreme Court has confirmed that Congress meant to confer "broad authority" on the Commission, so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[37] Courts thus have recognized that the Commission has substantial latitude when applying Congressional policies to marketplace developments not

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[35] It is no answer to suggest that wireless operators may overcome the problem by dealing with the subscriber directly and installing an antenna and any required inside wiring within the subscriber's unit. While a grant of WCA's Petition may alleviate the problem to some extent, the fact remains that in many instances property owners purchase telecommunications service on behalf of all tenants in an MTE, thus precluding any marketing of service on a unit-by-unit basis. Also, in many buildings the installation of an antenna on a tenant's balcony, porch or other location within the tenant's leasehold will not provide the line-of-site path necessary for receipt of wireless telecommunications services, thus mandating that the service provider install an antenna on the roof.

[36] *See MCI Telecommunications v. American Tel. & Tel.*, 512 U.S. 218, 231 (1994) (agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear).

[37] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (citations omitted). *See also National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943) (Congress granted the Commission "expansive powers" through the Communications Act); *see also* 47 U.S.C. § 154(i) (Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"); *id.* § 303 (Commission has the power to issue rules and regulations "as public convenience, interest and necessity requires").

anticipated when Congress passed the Communications Act.[38] The rapid growth of fixed wireless telecommunications services, and the corresponding need for fixed wireless service providers to have nondiscriminatory access to rooftop areas and conduit, represent exactly the sort of changed circumstances which the Commission can and should address under its own imprimatur, to ensure that the Congressional policies underlying Section 224 further the pro-competitive objectives of the 1996 Act in the new broadband environment.

WCA also concurs with the Commission's tentative conclusion that the text of Section 224(f)(1) does not limit the nondiscrimination requirement to public rights-of-way, and that competing providers of telecommunications services therefore are entitled to nondiscriminatory access under the statute where the utility's right-of-way is located on private property.[39] Other provisions of the Communications Act reflect that Congress understands the difference between a public and a private right-of-way, and uses explicit statutory language where it intends to limit a third party's right of access to public rights-of-way only. For instance, Section 621(a)(2) of the Cable Communications Policy Act of 1984 (47 U.S.C. § 541(a)(2)) amended the Communications Act to grant franchised cable operators a right of access to "*public* rights-of-way." The fact that Congress has used the term "public right-of-way" in other sections of the Communications Act strongly

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[38] *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966) ("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.").

[39] *NPRM* at ¶¶ 42-43.

suggests that when it omitted the word "public" from Section 224(f)(1), it did so intentionally.[40/] Had Congress intended to restrict Section 224(f)(1) to public rights-of-way, it presumably would have done so expressly as it did in Section 621(a)(2) of the 1984 Cable Act.[41/]

WCA thus believes that the Commission can and should declare that the term "right-of-way," as used in Section 224(f)(1), can encompass rooftops and conduit, and that utilities that own or control those areas are obligated to accord nondiscriminatory access to competing telecommunications providers, subject to the requirement of just and reasonable compensation already set forth in the statute. However, under no circumstances should the Commission permit a property owner to use disputes over just compensation as a pretext for denying a competitor timely access to an MTE. In the multichannel video context, the Commission has already recognized how disputes over just compensation delay competition in the MTE environment.[42/] WCA believes that the Commission can minimize the effects of such anticompetitive behavior simply by amending its rules to provide that where a competing provider notifies the property owner that it intends to use existing rights-of-way on his or her property, the property owner must allow the competitor to do so immediately if the competitor agrees to pay just compensation as determined by the parties among themselves or via arbitration. Furthermore, the Commission should declare that in all cases rates for access to rights-of-way in MTEs must be nondiscriminatory. In this way, the Commission will

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[40/] *See Russello v. United States*, 464 U.S. at 23, *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[41/] *Id.*

[42/] *Inside Wiring Order*, 13 FCC Rcd at 3679-80 (noting that incumbents delay nondiscriminatory access to home run wiring by alleging that their investment in the wiring has not been recouped).

establish clear, nondiscriminatory parameters for negotiations between competitors and property owners that reduce the possibility that property owners will extort unreasonable fees from competitors as a ransom payment for MTE access.[43/]

Finally, the Commission should reaffirm that where a utility places facilities in any right-of-way it owns or controls on MTE property, the utility must provide a competing telecommunications provider with nondiscriminatory access to all of its rights-of-way in the MTE, regardless of whether the utility is actually using those rights-of-way at any given time.[44/] Furthermore, when a utility cannot grant a competitor's request for access to a right-of-way due to lack of space, it should be required to exercise its right of eminent domain (or, alternatively, any relevant contractual rights given by the property owner) to expand its rights-of-way to accommodate the competitor's request.[45/]

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[43/] WCA would not oppose a rule which requires competing providers to assume the reasonable costs specifically attributable to installation of their own facilities and to assume the responsibility for reimbursing the property owner for the reasonable costs of any damage specifically attributable thereto.

[44/] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16080 (1996) ("use of any utility pole, duct, conduit, or right-of-way for wire communication triggers access to all rights-of-way, including those not currently used for wire communications").

[45/] *Id.*, 11 FCC Rcd at 16079 (1996) ("We believe a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments.").

*2. Incumbent LECs Should Be Required To Unbundle and Provide Competitors With Nondiscriminatory Access to All Intrabuilding Wiring and Other ILEC Facilities Within an MTE Under Section 251(c)(3) of the Communications Act.*

Though Section 224 relief is a necessary first step toward providing fixed wireless providers with any meaningful relief in this proceeding, standing alone it does not end the inquiry. This is because at most Section 224 provides competing providers with access to *space*, and not to any of an MTE's wiring that is controlled by the incumbent LEC. Section 224 may not afford a competitor end-to-end access from the rooftop to the subscriber. By now the Commission is well aware that in many instances property owners, often citing reasons relating to safety and aesthetics, simply will not tolerate the installation of multiple sets of wires in common areas, even where the property owner otherwise is favorably disposed to allowing a competitor into his or her building. If Section 224 does not provide a complete solution and the property owner can prevent a postwiring, competition will only arise if the competitor can use the incumbent LEC's intrabuilding wiring.[46/] Presently, however, the Commission's Rules do not include a provision which gives a competing telecommunications provider access to any of an incumbent LEC's intrabuilding wiring, which, in cases where postwiring is neither permitted by the property owner nor economically feasible, represents the only means through which a competitor is able to reach individual subscribers in MTE units.

Accordingly, the Commission should treat an incumbent LEC's intrabuilding wiring (plus any of its network interface devices) and points of presence as an unbundled network element

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[46/] By "intrabuilding wiring," WCA refers to all of an incumbent LEC's internal wiring in an MTE, including that which is not located on the customer's premises. It would include, for example, all vertical and horizontal riser cables and any other wiring used to connect the incumbent's network to the customer's unit.

("UNE") under Section 251(c)(3) of the Communications Act, and accord competing telecommunications service providers with access thereto under just, reasonable and nondiscriminatory rates, terms and conditions. There is little dispute that intrabuilding wiring satisfies the 1996 Act's definition of a "network element."[47/] Moreover, intrabuilding wiring need not satisfy the "necessary" requirement set forth in Section 253(d)(2)(A), since that requirement applies only to "proprietary" network elements. The hardware is basic wiring with a minimum amount of connecting equipment, and thus is not "proprietary" under the commonly understood definition of that term. By virtue of the postwiring problem discussed above, a competitor's inability to obtain access to existing intrabuilding wiring would clearly "impair" its ability to provide competitive telecommunications service, as that term is used in Section 253(d)(2)(B) of the Communications Act.[48/]

Finally, the Commission asks for comment on whether there are any technical impediments to unbundling of intrabuilding wiring under the UNE approach.[49/] The record before the Commission

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[47/] 47 U.S.C. § 153(29) (defining "network element" as "a facility or equipment used in the provision of a telecommunications service.").

[48/] 47 U.S.C. § 251(d)(2)(B). The Commission has broad discretion to interpret the term "impair" so long as its interpretation is consistent with the structure and language of the statute as a whole. *See Nat. R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417-18 (1992) (upholding Interstate Commerce Commission's interpretation of statutory term "required" to mean "useful or appropriate"); *see also* Comments of MCI Worldcom, Inc., CC Docket No. 96-98 and CC Docket No. 95-185, at 16 (filed May 26, 1999) ("[T]he impairment standard in § 251(d)(2) cannot be interpreted to require that unavailability of a network element makes it impossible for any CLEC to provide service. Congress established a higher threshold for access to proprietary elements than for nonproprietary elements, contrasting the necessary standard for the former with the impairment standard for the latter. In this context, 'impair' is plainly intended to be a less restrictive standard than 'necessary.' A CLEC, therefore, may be impaired even if access to the elements in question is not necessary to its provision of service.").

[49/] *NPRM* at ¶ 51.

in its UNE proceeding reflects that unbundling is technically feasible, and that there are in fact a number of cases in which the Regional Bell Operating Companies and CLECs have entered into such arrangements. For example, Teligent has noted that BellSouth is already providing unbundled access to intrabuilding wiring through interconnection agreements in Georgia, Florida, Kentucky, and Tennessee, and that U S WEST is already required to provide such access to requesting carriers in Nebraska and Oregon.[50/] In addition, the New York Public Service Commission expressly requires the provision of unbundled access to riser cables, and has directed Bell Atlantic to unbundle subloop elements of loop distribution, loop feeder and loop concentrator/multiplexer, finding that it would permit competing carriers to "develop local network[s] with far less reliance on New York Telephone facilities."[51/] These examples demonstrate that as a general matter there is no technical barrier to unbundling intrabuilding wiring provided that the incumbent (whether voluntarily or by force of law) cooperates with its competitors.

*3. The Commission Should Adopt A Federal Nondiscriminatory Access Rule For MTEs, and Take Other Steps To Facilitate Access If The FCC Determines Adoption Of Such A Rule Requires Further Proceedings Or Legislative Reform.*

At paragraph 53 of the *NPRM*, the Commission asks for comment on "whether building owners who allow access to their premises to any provider of telecommunications services should make comparable access available to all such providers under nondiscriminatory rates, terms and conditions." The Commission further inquires as to whether such nondiscriminatory access can and should be achieved via the imposition of a national nondiscriminatory access requirement on

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[50/] Comments of Teligent, Inc., CC Docket 96-98, at 11-12 (filed May 26, 1999).

[51/] *Id.* at 12 (footnote omitted).

property owners.[52] For the reasons set forth below, WCA believes that the Commission can and should adopt a federal nondiscriminatory access requirement for MTE property in this proceeding.[53]

To the extent that a property owner permits entry by his or her chosen provider but not its competitors, or achieves the same result by requiring competitors to pay exorbitant fees for access, competition in the MTE environment is thwarted.[54] Furthermore, where a property owner denies access to competing providers, the absence of a federal nondiscriminatory access law forces the consumer into the Hobson's choice of (1) purchasing service from a provider not of his or her own choice or (2) moving to another property where such choice is permitted. As a general matter, it is highly unrealistic to expect an MTE resident to take the drastic step of changing his or her own residence or business location simply to obtain telecommunications service from a particular provider. Indeed, a similar principle underlies the 1996 Act's number portability requirement: Congress believed that consumers should not be forced to surrender their telephone numbers as a precondition for obtaining service for their provider of choice, and thus the 1996 Act permits

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[52] *NPRM* at ¶ 55.

[53] It is essential to recognize the fundamental distinction between *mandatory* access and *nondiscriminatory* access. That is, WCA is not asking the Commission to rule that property owners must give all providers access to MTE property under any and all circumstances. Rather, WCA is only asking that the Commission ensure that where a property owner provides access to any one telecommunications provider, it cannot then give that provider a *de facto* exclusive right to serve the property by denying the same access to all other providers.

[54] It is for this very reason that the National Association of Regulatory Utility Commissioners ("NARUC") recently passed a resolution supporting "legislative and regulatory policies that allow customers to have a choice of access to properly certificated telecommunications service providers in multi-tenant buildings." *Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers,* NARUC 1998 Summer Meeting, Seattle, Washington. The NARUC Resolution also "supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider." *Id.*

consumers to retain their telephone numbers when they switch to a competing service provider. If it is unreasonable to expect a consumer to change his or her phone number for the privilege of purchasing service from a competitor, then it is extremely unreasonable to expect the consumer to change his or her address for that same privilege.

With these public interest considerations in mind, it becomes clear that the Commission has jurisdiction under the Communications Act to adopt a federal nondiscriminatory access requirement as a means of facilitating greater competition among telecommunications providers in MTEs. In addition to the broad powers conferred under the statutory provisions discussed in Section II(A) *supra*, Section 2(a) of the Communications Act give the Commission subject matter and *in personam* jurisdiction over all interstate and foreign communication by wire and radio, and over all persons engaged within the United States in such communications or such transmission of energy by radio.[55/] Furthermore, the term "radio communication" is defined to include not only the transmission of radio signals but "all instrumentalities, facilities, apparatus and services . . . incidental to such transmission."[56/] Thus, it is clear from the statute that the scope of the Commission's regulatory authority is not confined to entities licensed by the Commission to provide communications services.

The United States Supreme Court has affirmed this principle. For example, the Court has held that the Commission's "ancillary" jurisdiction is broad enough to encompass cable television, even where a cable television does not hold any FCC licenses.[57/] In so doing, the Court relied on its earlier holding that it may not, "in the absence of compelling evidence that such was Congress'

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[55/] 47 U.S.C. § 152(a).

[56/] *Id.* § 153(33).

[57/] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes."[58/] More recently, the Court observed that

> even though "Commission jurisdiction" always follows where the Act "applies," Commission jurisdiction (so-called "ancillary" jurisdiction) could exist even where the Act does not "apply."[59/]

It therefore is not surprising that the Commission, in a context not dissimilar to MTE access, has already concluded that "the provision of central office space for physical collocation is incidental to communications, thus rendering it a communications service under Section 3 of the Communications Act.[60/] Furthermore, it cannot be gainsaid that the adoption of a federal mandatory access rule would be "ancillary" to the Commission's Section 224 authority to ensure that competing telecommunications providers have nondiscriminatory access to essential facilities owned or controlled by utilities. More broadly, a federal nondiscriminatory access rule would also be "ancillary" to the Commission's explicit Section 706 obligation to employ "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[61/] That Section 706 is couched in such sweeping terminology suggests that Congress intended that the Commission take an *expansive* view of its authority to

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[58/] *Id.*, 392 U.S. at 177, *quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968).

[59/] *Iowa Utilities Bd.*, 119 S. Ct. 721, 728, 142 L. Ed. 2d 834, 850.

[60/] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd 18730, 18744 (1997).

[61/] 1996 Act, § 706(a).

regulate in the public interest, provided that there is no other provision in the Communications Act that explicitly stops it from doing so.[62/]

At the same time, however, it is evident even at this early stage of this proceeding that there is substantial disagreement within the Commission as to whether the agency has the requisite statutory authority to venture into this area.[63/] Thus, notwithstanding the substantial pro-competitive benefits of a national nondiscriminatory access requirement, there is every indication that the debate over this issue may be a long and contentious one. While WCA certainly believes that the Commission can and should attempt to craft a requirement that would satisfy all relevant jurisdictional and constitutional concerns, that effort will be self-defeating if the near-term

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[62/] However, WCA does not advocate that the Commission "micromanage" the relationship between competitors and property owners. Rather, any federal nondiscriminatory access rule adopted in this proceeding should be grounded in certain clearly defined principles that establish broad parameters for private negotiations between the parties. For instance, nondiscriminatory access should be available to *all* telecommunications service providers, regardless of whether they are offering the same service as the provider that is already on the property. Where space is legitimately exhausted, the property owner should be required to make adjacent space available subject only to reasonable safety and maintenance requirements (*e.g.*, where there is no remaining unused space in riser conduit which is under the ownership or control of the property owner, the property owner must allow the competitor to construct a second riser conduit if space is available in the building's common areas). *See generally Deployment of Wireless Services Offering Advanced Telecommunications Capability,* CC Docket No. 98- 147, FCC 99-48, ¶¶ 23, 43-44 (rel. March 31, 1999).

[63/] *See* Separate Statement of Commissioner Susan Ness, WT Docket No. 99-217 *et al.*, at 1 ("[T]he concept would impose a new regulation on building owners - - a class of persons not otherwise regulated by the Commission. . . [T]his may be one area that is better served by a legislative solution."); Statement of Commissioner Harold Furchtgott-Roth, WT Docket No. 99-217 *et al.*, at 1 ("[T]his Commission must be vigilant in overstepping its authority where private property rights are implicated. . . I fear that today's [national nondiscriminatory access] proposal, . . ., may stray outside this agency's jurisdictional boundaries."); Separate Statement of Commissioner Michael K. Powell, WT Docket No. 99-217 *et al.*, at 1 ("We have no specific statutory provision that directs, or 'empowers' us to assert regulatory authority over owners of private property. . . Assuming one believes it is permissible to use such plenary jurisdiction to regulate a building owner or a landlord, those powers seem to lack the specificity the law requires before treading onto constitutionally protected turf.").

competitive prospects of fixed wireless providers are held hostage to the process. WCA submits that the Commission can avoid this problem at least to some extent by taking the following carefully targeted actions that will facilitate (if not guarantee) that competitors will not be denied full and fair access to MTE property.

a. The Commission Should Impose a Permanent Ban On All Future Exclusive MTE Contracts And Adopt A "Fresh Look" Period For All Exclusive MTE Contracts Already In Effect.

The record before the Commission reflects that anticompetitive conditions in the telecommunications marketplace have been exacerbated by exclusive MTE contracts between incumbent providers and property owners. This should be no surprise to the Commission, since it is already very familiar with the anticompetitive effects of exclusive MTE contracts where multichannel video programming service is concerned. As WCA and others demonstrated in the Commission's inside wiring docket for multichannel video programming distributors, a significant percentage of MTEs are served by franchised cable operators pursuant to exclusive right of entry agreements entered into before competitive alternatives had emerged.[64/] Alternative MVPDs are frequently finding that MTE owners are refusing access, not because they do not desire to provide

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[64/] *See, e.g.*, Letter from Paul J. Sinderbrand, Esq., Counsel for the Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 2 (filed Oct. 2, 1996); Letter from Henry Goldberg, Esq., Counsel for OpTel, Inc. and MultiTechnology Services, L.P., CS Docket No. 95-184 and MM Docket No. 92-260, at 3-4 (filed Jul. 23, 1996); Comments of GTE, CS Docket No. 95-184 and MM Docket No. 92-260, at 21 (filed Mar. 18, 1996) ("As incumbent monopolists, cable operators today have established many long-term exclusive contracts with MDUs, in an overt attempt to thwart competition. Indeed, in those markets where competition is looming, cable operators have redoubled their efforts to 'lock up' MDUs before alternative providers can provide service. Thus, when alternative providers enter the market, the cable operator claims that any contact with MDUs under contracts constitutes interference with contractual or business relationships, thereby exposing the alternative provider to tort liability. This is proving to be a convenient method to significantly inhibit competition in those markets where MDUs are prevalent because only the existing monopolist currently has the ability to offer service.").

a competitor's service to their tenants, but because they entered into exclusive contracts with the local cable operator. The result, obviously, is that MTE residents are denied an opportunity to select among competing service providers.

Moreover, exclusive contracts in MTEs may have additional, previously unanticipated harmful effects on consumers in the wake of convergence. As noted in a recent General Accounting Office ("GAO") report:

> [T]he subscription television market could be affected by developments in the larger telecommunications market because other telecommunications companies, such as telephone companies, are attempting to provide consumers with "one-stop shopping" — that is, seeking to provide an array of services including telephone service, subscription television service, and Internet access. If several different types of companies — cable companies, telephone companies, electric companies, and companies using different kinds of "wireless" technologies — are successful in bringing a "bundle" of telecommunications services to consumers, competition among alternative delivery mechanisms — a cable wire, a telephone wire, an electric wire, and wireless — may develop. However, if one of the technologies that uses a wired connection to homes and businesses emerges as the most efficient, it could become the dominant means of delivering various telecommunications services, and greater competition for subscription television and other telecommunications services may not develop.[65/]

While the GAO is correct, the result it fears - - a failure of competition to develop - - is equally likely to arise if one competitor secures the exclusive right to provide even one of the bundled services demanded by consumers. In the post-convergence environment, those consumers who prefer to purchase all of their broadband services from one provider will have fewer choices if an incumbent is able to preclude its competitors from offering a complete package of video, voice and high-speed data offerings. Exclusive contracts in the MTE environment, even if limited to one

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[65/] "The Changing Status of Competition to Cable Television," United States General Accounting Office, Report to the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate, GAO/RCED-99-158, at 3 (July, 1999).

component of the bundled services, worsen the problem by effectively designating one provider as the only entity entitled to offer a complete broadband package to MTE residents. To the extent that exclusive contracts in MTEs lead to this result, they undermine the Commission's broad mandate to promote widespread, near-term deployment of broadband services to all market segments as desired by Congress.

Accordingly, these public interest factors militate strongly in favor of a Commission rule that prohibits exclusive contracts between property owners and providers of telecommunications services. The Commission's authority to do so should not be in dispute; indeed, several existing Commission rules preclude licensees from exercising rights of exclusivity to deny competitors access to real estate. For instance, Section 21.902(b) of the Commission's Rules bars any applicant, conditional licensee or licensee from entering into any lease with a building or tower owner that prevents another station from locating at the same site.[66/] WCA is merely asking the Commission to extend that same concept here, and prohibit any licensee or other entity subject to the Commission's jurisdiction from having an exclusive contractual right of access to MTE property that precludes nondiscriminatory access by competing providers.

The pro-consumer rationale for prohibiting exclusive MTE contracts also militates strongly in favor of a "fresh look" period for any such contracts already in effect. If property owners are not given an opportunity to reevaluate their existing exclusive contracts, incumbents will never be confronted with the possibility that an MTE resident might choose an alternative supplier who can bundle telephone, video and/or high-speed Internet access into packages tailored and priced to meet the needs of the tenant community. The simple fact is that incumbents have less incentive to bring

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[66/] 47 C.F.R. § 21.902(b)(1).

high-quality, competitively priced broadband services to tenants as quickly as possible if there is no threat that a competitor will be able to offer those same services.[67] So long as exclusive contracts continue to frustrate competitive entry into the MTE environment, tenants will never enjoy the benefits of unrestrained, head-to-head competition in the broadband marketplace. That, obviously, is not what the 1996 Act sought to promote, and thus militates strongly in favor of the application of a "fresh look" policy to existing exclusive MTE contracts for telecommunications services.[68]

There is no question that the Commission has the authority to apply a "fresh look" policy to exclusive contracts. On prior occasions, the Commission has applied a "fresh look" policy to private contracts in the telephone context, pursuant to its authority under Section 205 of the Communications Act to prescribe "just and reasonable charges" for telephone service. In 1992, for example, the Commission adopted a "fresh look" policy when it sought to open the market for "special access" services (*i.e.*, dedicated lines used for local connections between a customer and an

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[67] The Commission has recognized that competition spurs incumbents to introduce new services or improve existing ones. *See, e.g., Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Notice of Proposed Rulemaking*, 9 FCC Rcd 7665, 7666 (1994) ("[I]n providing communications services, the public interest is better served by competition. A competitive industry framework promotes lower prices for services, provides incentives for operators to improve those services and stimulates economic growth.").

[68] In no event should an existing exclusive contract defeat a competitor's statutory rights of access to rights-of-way or UNEs in an MTE. As the Commission noted in its *Section 207 Second Report and Order*, "[i]f a regulatory statute is otherwise within the powers of Congress, ..., its application may not be defeated by private contractual provisions." *Section 207 Second Report and Order*, 13 FCC Rcd at 23888, *quoting Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 311, 223-4 (1986).

interexchange carrier) to competitive entry.[69] Concerned about the ability of local carriers to "lock up" their respective markets, the Commission gave telephone subscribers having long-term access arrangements with the incumbent LEC an opportunity to terminate those agreements, without penalty, and avail themselves of competitive alternatives. Similarly, the Commission adopted a "fresh look" policy to promote competition in the market for toll-free "800" service. In that context, the Commission gave existing customers the option to terminate contracts for toll-free service, without liability, for a period of time after "800" numbers became portable among service providers.[70] In both cases, the Commission relied on its Section 205 authority even though the statute does not explicitly authorize the agency to apply a "fresh look" policy to private contracts.[71]

Nor would abrogation of exclusive MTE contracts under "fresh look" effect an unconstitutional taking of private property under the Fifth Amendment. It is well settled that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle

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[69] *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-64 (1992), *aff'd* 8 FCC Rcd 7341, 7345 (1993).

[70] *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5905-06 (1991). Moreover, as a general matter, courts have recognized the Commission's authority to prescribe a change in contract rates when it finds them to be unlawful, and to "modify other provisions of private contracts when necessary to serve the public interest." *Western Union Tele. Co. v. Federal Communications Commission*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

[71] The Third Circuit's decision in *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250 (3rd Cir. 1974) does not suggest otherwise. That case only stands for the very narrow proposition that Sections 203 and 204 of the Communications Act cannot be read to authorize a private carrier to abrogate intercarrier contracts by means of subsequently filed tariffs. Moreover, that decision (issued over twenty years prior to passage of the 1996 Act) has nothing whatsoever to do with the Commission's Section 706 mandate to promote competition in the market for broadband services, and thus has no bearing on the Commission's authority to adopt a "fresh look" policy in this proceeding.

is not a taking, because the aggregate must be viewed in its entirety."[72] Thus, for example, a cable operator's loss of exclusivity by virtue of the 1992 Cable Act's prohibition against exclusive franchises does not rise to the level of an unconstitutional taking:

> [The cable operator's] exclusivity provision was part of its contract, but it did not constitute the entirety of the contract. Evidence that [the cable operator] still provides services in accordance with the contract's remainder, coupled with the fact that one can logically discuss exclusivity as a characteristic separate from the contract, indicates that the destruction of exclusivity is not equivalent to destruction of the contract.[73]

The above quotation applies with equal force to exclusive MTE contracts for telecommunications or multichannel video services: where the incumbent retains a contractual right to remain on the property and provide service on a non-exclusive basis, the hypothetical loss of exclusivity via "fresh look" cannot be said to constitute destruction of the *entire* contract. Indeed, in the multichannel video context, Time Warner has already acknowledged that exclusivity is severable from an incumbent's broader contractual right to provide service, and has specifically asked the Commission to allow an incumbent's non-exclusive rights to remain in force where the incumbent's exclusivity has been eliminated via "fresh look."[74] When viewed in this context, it is apparent that an incumbent's loss of an exclusive right to serve an MTE is not a taking of constitutional dimension.

Given the general philosophy behind "fresh look" — that property owners who entered into long-term exclusive agreements should have an opportunity to select among multiple service

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[72] *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

[73] *Cox Communications, Inc. v. U.S.*, 866 F.Supp 553, 558 (E.D. Ga. 1994).

[74] Comments of Time Warner Cable, CS Docket No. 95-184 and MM Docket No. 92-260, at 10 (filed Dec. 23, 1997).

providers once competition arrives — the Commission must ensure that any "fresh look" period adopted in this proceeding is long enough to accommodate those fixed wireless providers who have yet to launch service but will be doing so in the near term. Here it must be emphasized that while fixed wireless providers generally have made substantial strides toward providing competitive telecommunications services in a number of markets, the fixed wireless industry is still in its incipient stages of development.[75/] Accordingly, to ensure that property owners have a full and fair opportunity to assess the benefits of competitive telecommunications service from fixed wireless providers, WCA asks that the Commission adopt a "fresh look" period of 18 months beginning on the effective date of any rules adopted in this proceeding. This would provide sufficient time for existing and future fixed wireless systems to make their services available to property owners in most major markets, without subjecting incumbent providers to the uncertainty of an open-ended "fresh look" period.[76/]

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[75/] *See, e.g., Fourth CMRS Competition Report,* Appendix F. For example, the Commission just recently completed reconsideration of its new rules allowing for two-way use of MDS and ITFS frequencies, and it is anticipated that the filing window for two-way MDS/ITFS applications may not open until the first quarter of next year. *See Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions (Report and Order on Reconsideration)*, MM Docket No. 97-217, FCC 99-178 (rel. July 29, 1999).

[76/] In the multichannel video context, WCA has recommended that the Commission impose a 180-day "fresh look" period to any exclusive access arrangement between a franchised cable operator and a property owner, beginning on the date when the Commission determines that the franchised cable operator faces "effective competition" as defined in the Commission's Rules. Comments of The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 15-17 (filed Dec. 23, 1997). That approach, however, is less workable where telecommunications services are at issue, since the Commission presently does not have an "effective competition" benchmark for telecommunications services that is comparable to the benchmark already in place for multichannel video. *See* 47 C.F.R. § 76.905. Moreover, unlike the case with multichannel video, there eventually will be as many as four or five providers offering different types of telecommunications services in many markets, thereby complicating any assessment of whether an

b. The Commission Should Preempt State Mandatory Access Statutes That Give Some Providers But Not Their Competitors The Right to Enter MTE Property Without the Property Owner's Consent.

Were the Commission to refuse to give competitors a right of nondiscriminatory access to MTE property, competing telecommunications providers would continue to be victimized by discriminatory state mandatory access statutes that give cable television operators or some other select class, but not their competitors, an automatic right to enter MTE property without the property owner's consent. In the multichannel video context, the record before the Commission already establishes that discriminatory state mandatory access statutes do *not* promote facilities-based competition. This is because discriminatory state mandatory access statutes only promote competition by permitting the incumbent cable operator to overbuild the facilities of a competitor; they do nothing to address the far more common situation where a competitor is denied access to an MTE served by the incumbent. Indeed, the Commission has found that of the 353 MTEs where cable operator Cablevision Systems Corp. had alleged that two-wire competition had developed in spite of New York State's discriminatory mandatory access law, the incumbent cable operator was the second entrant in over 95% of the cases.[77/]

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incumbent's telecommunications services are subject to effective competition in any given MTE property. WCA submits that since the Commission has already acknowledged that the telecommunications marketplace generally is still not competitive, it is neither efficient nor necessary for the agency to tie "fresh look" to a case-by-case analysis of whether incumbent providers of telecommunications services are subject to effective competition in potentially hundreds of thousands of MTEs in every market in the United States.

[77/] *See Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 and MM Docket No. 92-260, at ¶ 30 (rel. Aug. 28, 1997).

Given the commitment of AT&T and others to use cable plant to enter the local exchange market, WCA is concerned that the anticompetitive effects of discriminatory mandatory access statutes will soon extend to telecommunications services as well. Where a cable operator provides both telecommunications and multichannel video services to an MTE, a discriminatory mandatory access statute for multichannel video services may preclude entry by competitive providers of telecommunications services, even where the incumbent does not have an exclusive contractual right to offer telecommunications services to the property. This is because a property owner who is willing to suffer the intrusion of only a single set of wires (and can prevent it under the Commission's Rules) will invariably deny access to other service providers of *any* type if by law he or she must provide access to the franchised cable operator. The anticompetitive consequences of this scenario are self-evident. As the Commission stated recently:

> [T]he Commission is committed to ensuring access to all technologies including those that compete with cable. . . The federal interest we are protecting is not that of ensuring that the American people can get less costly cable television service, but rather that they have wide access to all available technologies and information services. If nonfederal regulations are acting as obstacles to this federal interest, they are subject to preemption.[78/]

Accordingly, WCA reiterates its call for the Commission to preempt any and all discriminatory state mandatory access statutes that give incumbent cable operators but not their competitors the right to enter MTE property without the property owner's consent.

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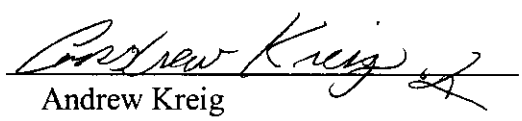
[78/] *Id.* at ¶ 15.

## III. CONCLUSION

Chairman Kennard was exactly right in observing that "[t]enants would see more choice and better prices if an incumbent faced a competitive environment sooner."[79/] As demonstrated above and in other filings submitted by competing telecommunications providers, preservation of the current noncompetitive *status quo* is no longer an option in the wake of the 1996 Act. The Commission has already demonstrated its commitment to Congress's pro-competitive agenda by commencing this proceeding in an expedited manner. WCA urges the Commission to remain on its pro-competitive course and adopt the rule modifications suggested by WCA, and thereby create more opportunities for consumers to enjoy the benefits of a fully competitive broadband marketplace.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: 

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August 27, 1999

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[79/] *Annual Assessment of the Status of Video Competition in Markets for the Delivery of Video Programming (Fourth Annual Report)*, 13 FCC Rcd 1034 (1998), Separate Statement of Chairman William E. Kennard, at 4.